IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 14292 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MUSABHAI HASAMBHAI VIKIYANI

Versus

COMMISSIONER OF POLICE RAJKOT

Appearance:

1. Special Civil Application No. 14292 of 2004

MR PRAVIN GONDALIYA for Petitioner

MR IM PANDYA AGP for Respondents

CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 02/03/2005

ORAL JUDGEMENT

1. This Special Civil Application under Article 226 of the Constitution of India has been filed by the petitioner challenging his detention in pursuance of the order passed against him by Police Commissioner, Rajkot

City, on 6th October, 2004, in exercise of powers conferred upon him under Section 3(1) of the Gujarat Prevention of Anti Social Activities Act, 1985 (PASA Act for short). The petitioner is under detention as bootlegger from 6th October, 2004 in pursuance of the above order.

2. The grounds of detention as placed on record reveal that the detaining authority took into consideration two types of material in arriving at subjective satisfaction. Firstly, the detaining authority placed reliance on solitary crime registered against the petitioner before Rajkot Rural Prohibition Station on 19th September, 2004 under the Bombay Prohibition Act whereby it was alleged that the petitioner was found in possession of 370 bottles of prohibited foreign liquor. The detaining authority examined thoroughly the investigation papers in the said crime and came to the conclusion that the petitioner was involved in the activities of storing, selling and transporting liquor and was a bootlegger within the meaning of PASA Act.

3. Secondly, the detaining authority relied upon two incamera statements as recorded by the sponsoring authority on 3rd October, 2004 and verified by the detaining authority on 5th October, 2004. The identities of the witnesses are not disclosed claiming privilege by the detaining authority under Section 9(2) of the PASA Act. Out of two witnesses, one witness referred to an incident occurred on 22nd July, 2004. At about 7.00 p.m., the witness was present at his place of business where approached by the petitioner is seen Asif and his accomplice Mahipatsinh in one ambassador car filled with crates of various liquor. All of them started selling prohibited liquor near the business place of the witness. The witness requested them not to execute such illegal activities near his business place. The petitioner rejected the request of the witness, so the witness stated that he might call police. On saying so by the petitioner, the petitioner and his accomplices got excited and they started beating the witness on commotion a crowd was gathered at that place, but none dared to rescue the petitioner, the witness was threatened by the petitioner with a knife to kill. To create a terror and fear, the petitioner and his accomplices rushed towards the crowd gathered around, so people started running helter-skelter. By act of supplication, however, the witness could save his skin.

4. The second incident occurred on 8th May, 2004, at

about 7.00 P.M., the petitioner, his son Asif and accomplice Mahipatsinh approached the witness at his business place and insisted that a bulk of prohibited foreign liquor was to be kept by the witness for sometime. The witness denied to keep such prohibited liquor at his business place. On refusal by the witness, the petitioner and his accomplices got excited and started beating the witness. In the meantime, the petitioner took out a knife and threatened to the witness to kill the commotion attracted and to create terror and fear, the petitioner and his accomplices rushed towards the crowd with open knife, so the persons started running helter-skelter. However, by act of supplication, the witness could save his skin.

5. Relied upon the above material, the detaining authority concluded that the petitioner was engaged in the activities of storing, selling and transporting prohibited liquor and was harassing innocent persons, who became obstacle in illegal activities of the petitioner. In view of the detaining authority, the petitioner was bootlegger within the meaning of PASA Act and that the bootlegging activities of the petitioner were required to be prevented forthwith. The detaining authority also concluded that the illegal activities of the petitioner were prejudicial to the maintenance of the public order and was affecting adversely to the public health. After considering other remedies available against the petitioner in general law, the detaining authority reached to the subjective satisfaction that there was no other alternative, except to detain the petitioner under the PASA Act. The detaining authority, therefore, passed an order of detention of the petitioner as aforesaid, which is under challenged in this petition.

6. Learned advocate P.S.Gondalia for the petitioner and learned AGP Mr.I.M.Pandya for the respondents were heard at length.

7. Out of various grounds urged on behalf of the petitioner and opposed and controverted by learned AGP, it appears that this petition can be examined and disposed of only on the issue that whether there was credible and cogent material placed before the detaining authority to come to the conclusion that by the activities of the petitioner, the public order was disturbed and public health was adversely affected.

8. To reach to the subjective satisfaction that bootlegging activities of the petitioner were prejudicial to the maintenance of public order and public health, the

detaining authority must rely upon credible and cogent material indicating that the activities of the detenu directly or indirectly were causing or were likely to cause harm, danger or alarm or feeling of insecurity among the general public or any section thereof or a grave or widespread danger to life, property or the public health. While undertaking this exercise, the detaining authority has to draw a clear line between the cases falling within the category of breach of law and order and the cases falling within the category of breach of public order.

9. Referring to the solitary crime filed against the petitioner under the Bombay Prohibition Act for the possession of prohibited liquor, and going through the investigation papers as placed on record, it is found that those solitary crime came to be filed against the detenu because she was dealing in prohibited liquor. The possession of prohibited liquor is a breach under the Bombay Prohibition Act and hence case came to be filed. However, merely filing solitary crime under the Bombay Prohibition Act would not result in a conclusion that the activities of the petitioner were disturbing the public order or was affecting adversely to the public health. At the most, the petitioner might have committed breach of the provisions of law, for which the petitioner may be tried and punished if found guilty, but surely the act constituting the offence in dealing in prohibited liquor cannot be said to have affected the even tempo of the life of the community nor the activities revealed through the investigating papers indicate that in the activities alleged through the solitary case, society at large or section of the society or community or particular community was involved. Therefore, the solitary case may be instances of breach of law and order, but cannot be branded as activities disturbing the public order or affecting the public health.

10. Further while referring to the in-camera statements, as recorded by the sponsoring authority and verified by the detaining authority, it must be borne in mind that while reaching to the subjective satisfaction about the alleged activities of the petitioner, it would be necessary for the detaining authority to consider fall out, reach and impact of the activities of the petitioner and thereafter to come to the conclusion that such activities were capable of disturbing the public order. Two incidents, as narrated through in-camera statements, reveal individual disputes than to involve society at large or even disturbing the even tempo of the life of the community. The potentiality of the act alleged

through in-camera statements, even from the bare reading of them, are not capable to be branded as to the activities disturbing the even tempo of life of the community or society at large or section of the society. No widespread danger or harm to the society could be inferred from the statements of the witnesses. Therefore, even after taking them on their face value, those incidents, may be instances of disturbing law and order, which can be taken care of by general law and by no stretch of reasoning, such activities can be branded to be disturbing the public order or affecting adversely to the public health.

10. In the matter of ASHOKBHAI JIVRAJ @ JIVABHAI SOLANKI vs. POLICE COMMISSIONER, SURAT and Ors. as reported in 2000 (1) GLH 393, wherein the Division Bench of this Court after considering the decision of the Apex Court, observed in paras 20 and 21 as under :

"20 The Division Bench then considered the law laid down by the Apex Court in Piyush Kantilal v. Commissioner of Police, Ahmedabad City, AIR 1989 SC 491 and Two. Devaki vs. State of Tamil Nadu, AIR 1990 SC 1086. In Piyush Kantilal, similar circumstances were before the detaining authority and it was alleged that detention of the detenu was necessary in order to prevent activities of the detenu in maintenance of public order. Similarly in Two. Devaki, panic amongst people in the hall in which the incident took place and in nearby vicinity was highlighted. It was also alleged that people were scared and had run helter-skelter. In spite of such allegations, the Supreme Court held that they were not cases of maintenance of public order and hence, no action of preventive detention was uncalled for.

21. The Division Bench, following the above cases, observed that in the opinion of the Supreme Court, the selective phrases in the statements would not take out the case from maintenance of law and order to that of maintenance of public order and as power of detention, could not be used for maintenance of law and order, but only for public order, the order of detention made in such circumstances could not be upheld.

Again in Mustakmiya Jabbarmiya Shaikh vs. M.M.

Mehta, Commissioner of Police and Others, 1995 (2) GLR 1268 (Sc), the Supreme Court considered the relevant decisions on point including the decisions in Arun Ghosh v. State of West Bengal, 1979 (1) SCC 98 and held that stray incidents would not affect "public order" and order of detention cannot be passed in such cases."

11. The present set of facts are squarely covered by the above decision of this Court in the case of Ashokbhai Jivraj @ Jivabhai Solanki (supra) and therefore the subjective satisfaction arrived at by the detaining authority in respect of disturbance of public order by the alleged activities of the petitioner cannot be said to be legal, valid and in accordance with law. The order under challenge, therefore, is required to be quashed and set aside on this ground alone.

12. In the result, the petition is allowed. The order passed by the Police Commissioner, Rajkot City on 6th October, 2004, against the petitioner in exercise of powers under Section 3(1) of the PASA Act is hereby quashed and set aside. The detenu MUSABHAI HASAMBHAI VIKIYANI is hereby ordered to be set at liberty forthwith if he is not required to be detained in jail for any other purpose. Rule is made absolute. Direct service is permitted.

[J. R. VORA,J.]

(vijay)